IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 1.8.2006

CORAM:

THE HONOURABLE MR.JUSTICE P.D.DINAKARAN
AND
THE HONOURABLE MR.JUSTICE P.P.S.JANARTHANA RAJA

T.C.No.112 of 2002

Commissioner of Income Tax
Salem. .. Appellant

Vs

M/s.Geetha Ramakrishna Mills P. Ltd.,
Salem. .. Respondent

PRAYER: Appeal under Section 260A of the Income Tax Act, against the order of the Income Tax Appellate Tribunal, Madras 'D' Bench, dated 22.5.2002 in ITA.No.1907/Mds/1992 Assessment Year 1989-1990 against the order of the Commissioner of Income Tax (Appeals), Coimbatore dated 21.5.92 made in IT Appeal No. 221-C/92-93 against the Order of the Asst. Commissioner of Income Tax, Company Circle, Salem-7 dated 27.3.1992 made in IR/PA No. G-14/AC(Com) SLM.

For Appellant : Mr.N.Muralikumaran
Sr.Standing Counsel (IT)

JUDGMENT

(Delivered by P.D.DINAKARAN,J.)

This appeal is directed against the order dated 22.5.2002 made in I.T.A.No.1907/Mds/1992 of the Income Tax Appellate Tribunal Madras 'D' Bench, raising the following substantial questions of law:

> "Whether on the facts and in the circumstances of the case the Tribunal was right in holding that interest under Section 234A, 234B and 234C of the Income Tax Act, 1961 cannot be levied in cases where the assessment was on the basis of book profits under Section 115J of the Act?"

2.1. The relevant assessment year is 1989-90. The respondent/assessee is a closely held company carrying on business in textiles. The assessee filed its return of income for the assessment year 1989-90 admitting Nil total income. The Assessing Officer

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passed an assessment order dated 27.3.1992 under Section 143(2) of the Income Tax Act (for brevity "the Act"), computing the book profit under Section 115J of the Act as Rs.17,90,717/- and arrived at the income of Rs.5,39,670/-, taking a stand that the unabsorbed loss or unabsorbed depreciation, whichever is less, is to be set off. Accordingly, the Assessing Officer allowed the unabsorbed business loss of Rs.21,65,013/- to be set off and refused to set off unabsorbed depreciation of Rs.96,16,268/- and thus, held that the respondent/assessee was liable to pay a total tax of Rs.3,11,631/- and also computed the interest under Section 234A, 234B and 234C and 201 (1A) of the Act to be Rs.2,43,275/-.

2.2. Against the order of assessment dated 27.3.1992, the assessee filed an appeal before the Commissioner of Income Tax (Appeals), who, by order dated 21.5.1992, held that when the liability arises under Section 115J of the Act no interest under Sections 234A, 234B and 234C of the Act, which are relevant only for computation of assessable income, could be levied.

2.3. The Revenue went on appeal before the Tribunal questioning the negation of interest payable under Sections 234A, 234B and 234C of the Act and the Tribunal dismissed the appeal and held in favour of the assessee. Hence, the present appeal.

3. Mr.N.Muralikumaran, learned Senior Standing Counsel for the appellant submitted that even if the liability arises on the computation of income under section 115J of the Act, interest is leviable under sections 234A, 234B and 234C of the Act and invited our attention to the following decisions:

(i)the decision of the Gauhati High Court in Assam Bengal Carriers Limited Vs. Commissioner of Income-tax, [1999] 239 ITR 862, whereunder it was held that interest under Sections 234B and 234C of the Act is chargeable even in a case where assessment is made under Section 115J of the Act;

(ii)the decision of the Madhya Pradesh High Court in Itarsi Oils and Flours Pvt. Ltd. Vs. Commissioner of Income-tax, [2001] 250 ITR 686, wherein it was held that Sections 234B and 234C of the Act do not make any reference to Section 115J of the Act. Section 234B lays down that where advance tax is required to be paid and there is failure to pay or if the amount of tax paid is less than 90 per cent. of the assessed tax, then the assessee is liable to pay interest. Similarly, under section 234C of the Act, a company shall be liable to pay simple interest for a period of three months on the amount of the shortfall from 15 per cent, 45 per cent, or 75 per cent, as the case may be, of the tax due on the returned income. The crux of the matter is that whenever the assessee

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is liable to pay advance tax, irrespective of section 115J, he has to pay the tax and if the tax deposited is less than 90 per cent the assessee would have to pay simple interest;

(iii) the decision of this Court in Commissioner of Income-tax Vs. Holiday Travels P. Ltd., [2003] 263 ITR 307 whereunder it was held that it was possible for the assessee to foresee its profit and make an estimate of the expected profit; the fact that the Income Tax Officer had applied the provisions of Section 115J at the time of completion of regular assessment was immaterial in considering the question of levy of interest under Section 234A for the delayed filing of the return or non-filing of the return; and that the Tribunal was not right in holding that interest was not leviable under Sections 234A and 234B of the act where the provisions of Section 115J of the Act were applied.

(iv) the decision of Bombay High Court in C.I.T. v. KOTAK MAHINDRA FINANCE LTD. [(2004) 265 ITR 119] wherein it was held that the interest can be levied under sections 234B and 234C of the Act for the shortfall in the payment of advance tax;

(v) the decision of Punjab and Haryana High Court in CIT v. UPPER INDIA STEEL MFG. & ENGG. CO. LTD [(2005) 279 ITR 123] wherein it is held that the non-payment or short payment due to the computation of income under section 115J of the Act attracts the levy of interest under sections 234B and 234C of the Act and that the estimation of current income does not exclude the income computed under section 115J of the Act.

4. Section 115J of the Income Tax Act, which provides special provisions relating to certain companies, contemplates the companies mentioned thereunder to prepare the profit and loss account for the relevant previous year under sub-section (1A) to Section 115J of the Act.

5. Of course, in Kwality Biscuits Ltd. v. CIT [(2000) 243 ITR 519], the Karnataka High Court held that since the entire exercise of computing the income or that of book profit could be only at the end of the financial year, the provisions of section 207, 208, 209 or 210 cannot be made applicable, unless and until the accounts are audited and the balance sheet is prepared, because till then, even the assessee may not know whether the provisions of section115J would be applicable or not.

6. However, in Commissioner of Income-tax Vs. Holiday Travels P. Ltd., [(2003) 263 ITR 307], this Court, had an occasion to consider the judgment of the Karnataka High Court in Kwality Biscuits Ltd. v.

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CIT [(2000) 243 ITR 519] and held that there was no difficulty for the assessee to estimate the profit during the current accounting year on the basis of projection of transactions and it was possible for the assessee to foresee its profit and make an estimate of the expected profit and the fact that the Income-tax Officer had applied the provisions of section 115J at the time of completion of regular assessment was immaterial in considering the question of levy of interest under section 234A for the delayed filing of the return or non-filing of the return.

7. Further, as pointed out by the learned senior standing counsel for the Revenue, the Bombay High Court in CIT v.KOTAK MAHINDRA FINANCE LTD. [(2004) 265 ITR 119] and the Punjab and Haryana High Court in CIT v. UPPER INDIA STEEL MFG. & ENGG. CO.LTD. [(2005) 279 ITR 123] also considered the judgment of the Karnataka High Court in Kwality Biscuits Ltd. v. CIT [(2000) 243 ITR 519] and held that where there is non-payment or short payment due to the computation of income under section 115J of the Act, interest can be levied under sections 234B and 234C of the Act and dissented from the view taken by the Karnataka High Court in Kwality Biscuits Ltd. Case, cited supra.

8. Even though it is brought to our notice that the decision of the Apex Court in Commissioner of Income-tax v. Kwality Biscuits Ltd., [(2006) 284 ITR 434], confirming the decision of the Karnataka High Court in Kwality Biscuits Ltd. v. CIT [(2000) 243 ITR 519], we find that the Apex Court has only dismissed the appeal. It is a settled law that dismissal simpliciter would not be a declaration of the law and it would not be a binding precedent (vide: Saurashtra Oil Mills Assn. v. State of Gujarat (2002)3 SCC 202: AIR 2002 SC 1130).

9. As we have already observed, the Division Benches of different High Courts, viz., the Madras High Court, the Bombay High Court and the Punjab and Haryana High Court considered the judgment of the Karnataka High Court in Kwality Biscuits Ltd. Case [(2000) 243 ITR 519] and dissented from the view taken by the Karnataka High Court. Therefore, agreeing with the view expressed by this Court as also other High Courts, viz., the Gauhati High Court, the Madhya Pradesh High Court, the Bombay High Court and the Punjab and Haryana High Court, referred to above, we have no option except to hold that even where the assessment was made under section 115J of the Act, interest could be levied.

10. That apart, in view of the introduction of Sections 115JA and 115JB of the Act with effect from April 1, 1997 by the Finance (No.2) Act, 1996, the question whether a company which is liable to pay tax under either of the provisions should pay advance tax does not assume much importance as specific provisions have been made in the section providing that all all provisions of the Act shall apply to the assessee being a company mentioned in the said section and therefore,

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Section 115J of the Act is no more available for the assessee for delaying the payment of advance tax in view of the insertion of Sections 115JA and 115JB of the Act.

For all these reasons, the question referred to us is answered in favour of the Revenue and against the assessee and the appeal is allowed.

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Sd/
Asst.Registrar

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Sub Asst.Registrar

To

1.The Assistant Registrar,
Income Tax Appellate Tribunal
IIIRD Floor, Rajaji Bhavan,
Besant Nagar, Madras-90.

2.The Secretary, Central Board
of Direct Taxes, New Delhi.

3.The Commissioner of Income Tax
(Appeals), Coimbatore.

4.The Asst.Commissioner of Income-tax,
Company Circle, Salem-7.

5.The Commissioner of Income Tax,
Salem.

6.The Income Tax Appellate Tribunal,
Madras "D" Bench,
Madras (Camp at Coimbatore)

ONE CC TO MR.N. MURALIKUMARAN, ADVOCATE SR NO 34202

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